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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-128

MARVIN MANDEL, GOVERNOR OF MARYLAND, ET AL.,
Appellants,

v.

BRUCE BRADLEY, ET AL., *Appellees.*

On Appeal from the United States District Court for the District of Maryland

MOTION TO AFFIRM

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INDEX

Page

OPINION BELOW. 2

JURISDICTION 2

QUESTION PRESENTED 2

STATUTES INVOLVED 3

STATEMENT OF THE CASE. 4

ARGUMENT 6

CONCLUSION 19

Table of Authorities

American Party of Texas v. White,
415 U.S. 767 (1974). 16

Bullock v. Carter,
405 U.S. 134 (1972) 16

Dunn v. Blumstein,
405 U.S. 330 (1972). 16

Hicks v. Miranda,
422 U.S. 332 (1975). 11, 15

Kramer v. Union Free School District,
395 U.S. 621 (1969) 16

Salera v. Tucker,
399 F. Supp. 1258 (E.D. Pa. 1975),
aff'd. sub nom.), Tucker v. Salera,

Page

_____ U.S. _____, 96 S. Ct.
1451 (1976) 7,8,
9,10,11,12,13,15

Storer v. Brown,
415 U.S. 724 (1974) 8,16,
18

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ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR
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Appellees, pursuant to Rule 16 of the Rules of the Supreme Court of the United States, move that the final judgment and decree of the District

Court be affirmed on the ground that the question is so insubstantial as not to warrant further argument.

OPINION BELOW

The Opinion and Order of the District Court are set forth in the Appendix of the appellants' jurisdictional statement at 1a and 14a, respectively.

JURISDICTION

The jurisdictional requisites are adequately set forth in the appellants' jurisdictional statement. However, appellees additionally assert 28 U.S.C. Sec. 1343(3) as a basis of jurisdiction.

QUESTIONS PRESENTED

Whether Maryland Code (1976 Replacement Volume), Article 33, Sec. 7-1(e) deprives the appellee candidate

and voters of rights guaranteed to them by the First and Fourteenth Amendments to the United States Constitution in that this statute requires independent candidates for statewide office to file petitions containing the signatures of 51,155 registered voters of Maryland with the county election boards on March 8, 1976, which date is 70 days prior to the primary election in Maryland and which is 239 days prior to the general election, in order for the independent candidate's name to appear on the ballot in the general election to be held in November, 1976.

STATUTES INVOLVED

Pertinent provisions of the Maryland Election Code are set forth in the appellants' jurisdictional state-

ment at 19a.

STATEMENT OF THE CASE

Appellees will accept the Statement of the Case which appears in the appellants' jurisdictional statement at 3-11. However, two caveats must be made. First, in the Statement of the Case and elsewhere, appellants seriously misstate in several aspects the opinion of the District Court. For instance, whereas appellants claim that the District Court did not weigh alleged compelling state interests (Jurisdictional Statement at 9), the District Court analyzed all legitimate proffered state interests (See Opinion of District Court, Appellants' Jurisdictional Statement 6a-8a). Appellees commend for this Court's consideration the actual opinion of the District Court rather than the appellants' interpretation of that opinion. Second, appellants' jurisdictional statement relies heavily on the testimony of its expert witness, Richard

Smolka, who was termed a "qualified expert on the law and conduct of elections". (Jurisdictional Statement at 6-7, 19-21). The appellants fail to point out that while being subjected to voir dire at the hearing before the District Court, Smolka admitted that he had never been a political candidate, had never managed a political campaign, had never managed a petition drive, had never actively participated in a petition drive, and indeed had never solicited one signature on a single nominating petition. Although Witness Smolka survived a motion to strike his testimony at hearing, the District Court stated that his testimony had been substantially impeached.

Again, Appellees commend for this Court's consideration the opinion of the District Court for the factual analysis of this case and urge this Court not to rely upon the appellants' interpretation of its own evidence.

ARGUMENT

In order for an independent candidate for statewide office in Maryland to have his name placed on the ballot in November, 1976, it was necessary for the independent candidate to deliver to the county election boards of the State on March 8, 1976, petitions to which were appended the signatures of 51,155 registered voters of Maryland. March 8, 1976, is 70 days prior to Maryland's primary election, and 239 days prior to the general election to be held in November. If the

independent candidate successfully filed those signatures in March, he would not take part in the primary election. Rather, his name appears as of right on the ballot for the general election.

The District Court found that this statute violated the cor stitutional rights of the plaintiffs below in that the early filing provision placed an undue burden on the exercise of First and Fourteenth Amendment rights. That decision is manifestly correct and should be affirmed without further argument.

Appellees submit that the decision below was fully supported by a recent order of this Court in Tucker v. Salera, ____ U.S. ____, 96 S.Ct. 1451

(1976), affirming Salera v. Tucker, 399 F. Supp. 1258 (E.D. Pa. 1975).

Salera involved a Pennsylvania statute which was challenged on grounds that the statute required the filing of nominating petitions by certain candidates 218 days before the general election and required that all signatures be gathered for those petitions during a three week period only.

The Salera District Court faced the two questions separately. First, the District Court considered the constitutionality of the brief three week signature collection period and, relying upon Storer v. Brown, 415 U.S. 724 (1974), found that collection period constitutional. 399 F. Supp. at 1265.

The Salera District Court then

passed on to the second constitutional challenge -- that the requirement for filing signatures on nominating petitions at a date 218 days in advance of the election was constitutionally impermissible. There is no doubt that this issue was considered by the Salera District Court completely separately from the issue of the brevity of the three-week collection period. The District Court stated that:

> The second half of plaintiffs' challenge to Sec. 2913(b) and Sec. 2913(c) -- that the period for gathering signatures on nominating petitions is so remote from the general election that it substantially impairs plaintiffs' ability to appear on the ballot or to vote for otherwise qualified candidates -- raises different issues than were raised by plaintiffs' challenge to

> the three-week limitation. 399 F. Supp. at 1266 (emphasis added).

Following this severance of issues, the Salera District Court held that the requirement for filing signatures on petitions by a date far removed from the general election was unconstitutional. 399 F. Supp. at 1269.

Salera was appealed by the State of Pennsyvania to this Court, and, on motion of the plaintiffs in Salera, this Court affirmed the decision below. Tucker v. Salera, ____ U.S. ____, 96 S. Ct. 1451 (1976).

The District Court decision in Salera is binding in the instant case due to the summary affirmance by this Court (1) if the issue necessarily

affirmed by this Court in Salera is the same issue present in the Bradley litigation; (2) if the two cases are factually indistinguishable, and (3) if Maryland has proffered no valid state interests in support of its legislation which were absent in Salera. See Hicks v. Miranda, 422 U.S. 332 (1975); Opinion of the District Court, Appellants' Jurisdictional Statement at 8a.

Appellees submit that the above requisites are present in the instant litigation and that the Bradley District Court properly applied Salera to the instant case.

First, it is clear that the District Court in Salera decided one and only one issue. As described above,

the Salera District Court expressly divorced the issue of the three week time limitation from the issue of the early filing date. Only the latter issue was utilized by the Salera District Court to find the statutory scheme unconstitutional and only that latter issue was necessarily affirmed by this Court. The issue decided by the Bradley District Court was the burdensome nature of an early petition filing date, the exact issue determined in Salera.

Second, Salera is factually indistinguishable on the determinative issue in the case. In Salera, the District Court found unconstitutionally burdensome a filing date for nominating petitions which was 218 days prior to

the general election. In Bradley, the filing date for petitions is 239 days prior to the date of the general election -- an even more onerous requirement than that found unconstitutional in Salera.

Third, Maryland presented the Court with no valid state interests which were absent in Salera. After discussing the state interests alleged and found unpersuasive in Salera, and finding them equally unpersuasive in the Bradley litigation, the Bradley District Court considered and dismissed an additional state interest which Maryland asserted in an attempt to slide the case from under the Salera decision. See Opinion of the District Court, Appellants' Jurisdictional Statement at 9a. That additional

alleged state interest was the purported concern that Maryland treat its partisan and non-partisan candidates alike. The State asserted that since partisan candidates must file a certificate of candidacy on March 8, 1976, that independents should be required to file their petitions on March 8, 1976. This treatment, however, could not be more unequal. While partisan candidates merely sign certificates indicating their intention to run for office and need not file any petitions, Bradley was required to file petitions containing 51,155 signatures on that date. If there is a state interest to be served in treating partisan and non-partisan candidates alike, the present statutory scheme does not serve that

interest. The unequal treatment is obvious and was so recognized by the Bradley District Court.

The correctness of the decision in the Bradley District Court could not be clearer. The decision recognized the vitality and dispositive nature of the Salera case and painstakingly analyzed Salera to determine if there were any distinguishing features. The Bradley District Court, finding no meaningful distinctions between Salera and Bradley, applied Salera as binding law in the case. The reliance on Salera by the Bradley District Court was a proper application of a case which had been summarily affirmed by this Court. Hicks v. Miranda, supra. The Opinion in Bradley presents this Court with a case clearly

calling for summary affirmance.

The Bradley District Court decision also complied with more traditional case law of this Court.

A long line of cases has indicated that substantial burdens on the right to vote or to associate for political purposes are constitutionally suspect and invalid under the First and Fourteenth Amendments and under the Equal Protection Clause unless they are essential to serve a compelling state interest. Storer v. Brown, 415 U.S. 724, 729 (1974); see e.g., American Party of Texas v. White, 415 U.S. 767, 780 (1974); Dunn v. Blumstein, 405 U.S. 330, 343 (1972); Bullock v. Carter, 405 U.S. 134, 144 (1972); Kramer v. Union Free School District, 395 U.S. 621, 627 (1969). The Bradley District

Court duly followed this Court's admonitions and fully considered all facially legitimate state interests proffered by Maryland. Those state interests were found to be adequately protected by other mechanisms which did not impinge on the Plaintiffs' rights or, subsequent to the District Court's scrutiny, were deemed by the District Court not to present a compelling state interest at all. See Opinion of the District Court, Appellants' Jurisdictional Statement, 6a-9a.

Finally, we are instructed by this Court that the actual history of candidates' success in gaining ballot placement under the constraints of state statutes is valuable in determining whether those statutorily imposed constraints are constitutionally per-

missible:

> Past experience will be a helpful, if not always an unerring guide: it will be one thing if independent candidates have qualified with some regularity and quite a different matter if they have not. (Storer v. Brown, 415 U.S. 724, 742 (1974)).

In effect, the proof of the pudding is in the tasting. In Maryland, no independent candidate has ever qualified through the nomination by petition process for ballot placement for a statewide office where, as here, the independent must file his nominating petitions in March for a general election to be held in November.

CONCLUSION

We respectfully submit, therefore, that the appellants present no substantial question for the decision of this Court, and that the judgment and decree of the District Court should be affirmed.

Respectfully submitted,

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